mcglinchey
we give you more

The Bullet Point: Ohio Commercial Law Bulletin

Is my conduct a violation of the Consumer Sales Practices Act?

Volume 4, Issue 18
October 2, 2020
Jim Sandy and Stephanie Hand-Cannane

Unconscionable arbitration agreement

***Klonowski v. Lynch*, 8th Dist. Cuyahoga No. 109086, 2020-Ohio-4567**

In this appeal, the Eighth Appellate District reversed and remanded the trial court's decision finding that the arbitration agreement was not unconscionable, as it incorporated by reference the arbitration forum's rules and procedures.

- **The Bullet Point:** To successfully prove an arbitration agreement is unconscionable, a consumer must demonstrate that the agreement was both procedurally and substantively unconscionable. In analyzing an arbitration agreement for procedural unconscionability, courts look at the relative bargaining position of the contracting parties, whether the terms were explained to the weaker party, and if the weaker party had the option of obtaining the goods or services from an alternative source. A consumer who had other meaningful choices but who chose to agree to legible, clear arbitration terms in bold print cannot later argue that he was the weak party in the transaction. In addition, courts analyze an arbitration agreement for substantive unconscionability by looking at whether the terms are commercially reasonable. In Ohio, it is the industry standard and commonplace for an arbitration agreement to incorporate by reference the rules and procedures of the arbitration forum. As such, a consumer cannot allege an arbitration agreement is unconscionable simply because it incorporates by reference but does not list out the arbitration forum's rules and procedures.

Notice of Default

***LNV Corp. v. Kempffer*, 11th Dist. Geauga No. 2019-G-0232, 2020-Ohio-4527**

In this appeal, the Eleventh Appellate District affirmed the trial court's decision, holding that the borrowers were already notified their loan had been accelerated when they received their second notice of default and that the deadline to cure the default was not extended.

- **The Bullet Point:** Provided a mortgage requires notice before accelerating a defaulted loan, and a borrower fails to timely bring a loan current after receiving a notice of default, the mortgagee is authorized to accelerate the loan. If the borrower remits a partial payment but fails to fully pay the amount past due, the mortgagee is still within its right to accelerate the loan. Once the borrower is notified its loan has been accelerated, the mortgagee's right to accelerate is not delayed by subsequent notices of default sent to the borrower. Stated differently, even if a second notice of default is sent because a

borrower made a partial payment, the second notice does not give the borrower additional time to cure its default once its loan has already been accelerated.

Lis Pendens

***Clinton v. Home Invest. Fund V, Lp, Successor in Interest to Mtge. Electronic Registration Sys.*, 1st Dist. Hamilton No. C-190646, 2020-Ohio-4555**

In this case, the First Appellate District dismissed the appeal as moot as the appellant failed to obtain a stay of execution or post a supersedeas bond in order to reinvoke lis pendens.

- **The Bullet Point:** The doctrine of lis pendens "protects the status quo of the litigants' interest in the subject property while an action is pending." Under R.C. 2703.26, the filing of a lawsuit concerning specific property gives notice to others of the claim alleged in the pending lawsuit and that a purchaser takes the property subject to the outcome of the lawsuit. Simply stated, while litigants are not prevented from conveying away property that is the subject of a lawsuit, the conveyed interest becomes subject-to the outcome of the pending litigation. As the court noted, lis pendens is a procedural doctrine which operates only while the action is pending. Once final judgment has been rendered, lis pendens terminates and no longer protects the litigants' interest. Consequently, an aggrieved party must seek a stay of judgment pending appeal in order to reinvoke lis pendens and protect its interest in the underlying property.

CSPA

***Barlow v. Gap, Inc.*, 8th Dist. Cuyahoga No. 109101, 2020-Ohio-4382**

In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing that the CSPA is not a strict liability statute and that the consumer failed to prove the supplier's signs were false, material, or misleading.

- **The Bullet Point:** Ohio courts have not interpreted the Consumer Sales Practices Act ("CSPA") to be a strict-liability statute and instead consider "reasonableness" when determining whether conduct violates the CSPA. Simply put, the issue of whether a supplier's act or omission is a violation of the CSPA depends on how a reasonable consumer would view it. Under this reasonableness standard, a consumer must prove that the supplier's conduct was deceptive under the CSPA in that it "has the tendency or capacity to mislead consumers" and is material to the decision to purchase the product or service offered for sale. Consequently, a supplier will not be liable under the CSPA unless the consumer can prove its action was false, material to consumers' purchasing decisions, and likely to mislead a reasonable consumer.

contact

James Sandy
member > cleveland

T (216) 378-9911
jsandy@mcglinchey.com

Stephanie Hand-Cannane
associate > cleveland

T (216) 378-4989
shandcannane@mcglinchey.com

[Cite as *Klonowski v. Merrill Lynch*, 2020-Ohio-4567.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

DANIEL J. KLONOWSKI, :

Plaintiff-Appellee, :

No. 109086

v. :

MERRILL LYNCH, ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: September 24, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-914407

Appearances:

Paul V. Wolf Co. and Paul V. Wolf, *for appellee*.

McGlinchey Stafford, P.L.L., and Bryan T. Kostura;
Bressler, Amery & Ross, P.C., and Logan S. Fisher,
for appellant.

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Defendants Merrill Lynch, Pierce, Fenner & Smith, Inc. and James R. Sophia, Jr. (collectively "Appellants") appeal the trial court's denial of their motion

to compel arbitration and stay proceedings and assign the following error for our review:

> I. Whether the trial court's September 23, 2019 journal entry erred by denying the Motion to Compel Arbitration and Stay Proceedings filed by Defendants/Appellants Merrill Lynch, Pierce, Fenner & Smith Incorporated and James R. Sophia, Jr.

{¶ 2} On November 12, 2007, Daniel Klonowski ("Klonowski") opened a cash management account with Appellants. Klonowski, who is an attorney, signed Appellants' Client Relationship Agreement ("the CRA"), which included an arbitration clause.

{¶ 3} On April 24, 2019, Klonowski filed a complaint against Merrill Lynch alleging promissory estoppel, breach of contract, negligence, and breach of fiduciary duty related to alleged mismanagement of Klonowski's account. Appellants filed a motion to compel arbitration and stay the proceedings in the trial court. The trial court held a hearing on August 8, 2019, and denied the motion on September 23, 2019. It is from this denial that Appellants appeal.

Appellants' CRA

{¶ 4} The CRA that Klonowski signed when he opened his account with Appellants is six pages long. Within these pages, there are two references to arbitration. First, just above Klonowski's signature, which was required on one page of the CRA, the following language is in bold print:

> BY SIGNING BELOW, I AGREE TO THE TERMS OF THE MERRILL LYNCH CLIENT RELATIONSHIP AGREEMENT ON THE REVERSE SIDE AND: * * * 2. THAT, IN ACCORDANCE WITH SECTION 8, PAGE 2 OF THE CLIENT RELATIONSHIP AGREEMENT, I AM

> AGREEING IN ADVANCE TO ARBITRATE ANY CONTROVERSIES THAT MAY ARISE WITH YOU * * *.

{¶ 5} Second, Section 8 of the CRA, which is entirely in bold print and is titled "AGREEMENT TO ARBITRATE CONTROVERSIES," states in pertinent part as follows:

> This Agreement contains a predispute arbitration clause. By signing an arbitration agreement, the parties agree as follows: All parties to this Agreement are giving up the right to sue each other in court * * *. The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this agreement.
>
> Any arbitration pursuant to this provision shall be conducted only before the New York Stock Exchange, Inc., an arbitration facility provided by any other exchange of which Merrill Lynch is a member, or the National Association of Securities Dealers, Inc. * * *.

{¶ 6} Section 8 of the CRA also states that the consumer — in this case, Klonowski — may choose the forum from among those listed, and if the consumer fails to choose, Merrill Lynch will select the forum. Additionally, the CRA states that "[a]rbitration awards are generally final and binding," subject to limited ability for appellate review; "discovery is generally more limited in arbitration than in court proceedings"; "arbitrators do not have to explain the reason(s) for their award"; "[t]he panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry"; arbitrable claims include "those involving any transaction in any of your accounts with Merrill Lynch, or the construction, performance or breach of any agreement between us"; and "Judgment upon the award of arbitrators may be entered in any court, state or federal, having jurisdiction." Furthermore, Section 8 of the CRA notes that time limits for bringing

a claim in arbitration may be imposed and explains the limitations of arbitrating class actions.

The Motion to Compel Arbitration

{¶ 7} Appellants sought a trial court order compelling Klonowksi to arbitrate his claims pursuant to the CRA and stay his pending complaint. Appellants argued that the parties agreed in the CRA to arbitration as the dispute resolution forum, and Klonowski's claims against Appellants all relate to his account, thus falling within the scope of the arbitration clause.

{¶ 8} Klonowski, on the other hand, argued that he only saw the one page of the CRA with his signature on it, and that page does not have the terms of the arbitration clause on it. Therefore, Klonowski argued, there was no agreement to arbitrate. In his opposition to Appellants' motion to compel arbitration, Klonowski attached an affidavit, which reads in part as follows:

> I executed a one page Merrill Lynch Client Relationship Agreement which is attached hereto as Exhibit "1."
>
> That to the best of my knowledge, the one page Merrill Lynch Relationship Agreement was faxed to me at my law office and the one page document was accompanied by instructions to fill in the agreement by handwriting.
>
> That I supplied information in handwriting on the single page that I believe was faxed to me and signed that one page document on November 12, 20[0]7.
>
> That the one page document that was faxed to me and which I signed did not have a reverse side and the fine print on the one document which I was instructed to sign was in substantial portion illegible and appeared substantially identical to that which is attached hereto as Exhibit "1".

> That this was the only page of any agreement with Merrill Lynch that was ever placed before me or otherwise shown to me until I received and read Defendants' Motion to Compel Arbitration and the documents attached hereto.

{¶ 9} In the alternative, Klonowski argued that the provisions in the CRA were procedurally and substantively unconscionable, because they "run afoul of the test set forth in *Cole v. Burns International Security Services,* [105 F.3d 1465 (D.C.Cir.1997)]." Specifically, Klonowski argued that the CRA: does not provide for a neutral arbitrator; is not clear whether more than minimal discovery is permitted; states that the arbitrators do not have to explain the reasons for their award; gives no indication regarding available relief; and exposes him to unreasonable costs.

{¶ 10} In Appellants' reply brief in support of arbitration, they argued that "parties to a contract are presumed to have read the contract and have knowledge of its contents." Appellants provided the court with Klonowski's original ink signature on the CRA showing that the document was, in fact, legible and was not provided to Klonowski via fax. Appellants attached an affidavit from Sophia stating that, while he did "not recall the specific circumstances surrounding [Klonowksi's] account opening process, it was not, and has never been, my business practice to send a client *only* the signature page to a" CRA. (Emphasis sic.) Sophia's affidavit further stated that his

> standard operating procedure in connection with client's opening new accounts was to: (i) meet in person with the potential client and have them execute the necessary account documentation at the in person meeting; or (ii) if an in person meeting was not possible, I would mail the entire document(s) to the client for execution and request that the document be returned to me at Merrill.

{¶ 11} Appellants further argued to the trial court that the CRA was not procedurally or substantively unconscionable. First, Appellants pointed out that "*Cole* is a D.C. Circuit case which is not controlling." Second, Appellants argued that there was no absence of meaningful choice, in that Klonowski "could have opened an account with virtually any other brokerage firm if he did not want to agree to the terms of the [CRA]." Third, Appellants argued that the contract terms are not unreasonably favorable to them.

The Hearing

{¶ 12} At the hearing on Appellants' motion to compel arbitration, the parties first addressed whether the CRA was enforceable, based on Klonowski's allegation that he only saw the page he signed. Klonowski's attorney argued that "I don't necessarily think that it's his responsibility to ask if there [are] other pages to the * * * [CRA]."

{¶ 13} In response, Appellants' attorney stated as follows:

> there is an onus on Mr. Klonwoski based upon the fact he signed the relationship agreement and agreed to these terms, and the fact of the matter is these were not in fine print. These were not hidden someplace in the contract. They're laid out very clearly about what they can and cannot do and the rights and responsibilities for which Mr. Klonowski agreed to pursuant to this contract.

{¶ 14} The court agreed with Appellants as follows: "I agree that the Plaintiff had an obligation if he is signing this and he didn't get all these pages, to say, well, where is the section on arbitration because that is one of the last sentences just above

where he signed." The essence of the court's conclusion was that Klonowski agreed to the CRA in its entirety.

{¶ 15} The parties next argued about whether the CRA was unconscionable, and the court stated the following on the record:

> It says in here that * * * the rules of the arbitration forum in which the claim is filed and any amendments thereto shall be incorporated into this agreement.
>
> Can someone point me to the arbitration forum rules that are incorporated into this agreement, because that's where I see a problem, not with the facts [sic] that [the] arbitration agreement is not — that there is not a section in here that addresses it, but where is the rest of the — where are the rest of the applicable rules here for the arbitration [forum]?

{¶ 16} The court continued: "There [are] choices that he can make as far as which arbitrator he wants to use, but there is no — that's not provided. There is a certain list, but he has to guess as to which arbitrat[ion forum Appellants are] a member of." According to the court, "shouldn't that have been part of the agreement? * * * But under the arbitration provision where it is being incorporated into the agreement, there is no information provided to the person who is being bound by this agreement as to where to go or where to get this list of acceptable arbitrators to choose from."

{¶ 17} Appellants' attorney argued that, if a dispute arose, the consumer could choose the arbitration forum, of which Appellants are members, from those listed in the CRA. Thereafter, "the arbitration rules would be incorporated once the specific forum is chosen. We're not going to choose a forum for the — for Mr. Klonowksi unless he decides not to choose one for himself."

{¶ 18} In response, Klonowski's attorney argued that it "would be difficult" for a customer to determine which arbitration forums Appellants were members of and that "the terms itself are very problematic." The remainder of Klonowski's attorney's arguments at the hearing concerned his client allegedly not receiving all of the pages of the CRA.

Analysis

{¶ 19} In its September 23, 2019 journal entry, the court made the following findings when denying Appellants' motion to compel arbitration: "Substantial terms for this arbitration provision are contained in different documents which were never given to plaintiff, shown to plaintiff, or put in front of plaintiff, and thus this arbitration clause is both procedurally and substantively unconscionable."

{¶ 20} To support its finding, the court relied on *Jamison v. LDA Builders, Inc.*, 11th Dist. Portage No. 2011-P-0072, 2013-Ohio-2037, a case in which the plaintiffs "entered into a New Home Purchase Agreement with LDA, a seasoned home builder, for the construction of a home * * *." *Id.* at ¶ 2. In *Jamison*, the court found that the arbitration clause at issue was both procedurally and substantively unconscionable when the plaintiff did not receive the arbitration agreement until after signing the contract at issue, the defendant had the right to choose the arbitrator, and the plaintiffs "could obtain a copy of the applicable rules and procedures upon request." *Id.* at ¶ 48.

{¶ 21} Upon review, we find that the facts of the case at hand are different than the facts in *Jamison*. In the instant case, the arbitration clause was included in

the document that Klonowski signed on November 12, 2007. Although Klonowski argued that he was only provided with the signature page, therefore, he never agreed to arbitrate, the trial court did not find this argument to be credible. Klonowski's signature is on a page that states he is agreeing to arbitration "in accordance with section 8, page 2" of the CRA. Klonowski is an attorney, and a "party to a contract is presumed to have read and understood the terms and is bound by a contract that he willingly signed." *Michael A. Gerard, Inc. v. Haffke*, 8th Dist. Cuyahoga No. 98488, 2013-Ohio-167, ¶ 19. Furthermore, Klonowski had the right to choose an arbitrator from a finite list, and the applicable arbitration rules were incorporated by reference.

Standard of Review for a Motion to Compel Arbitration

{¶ 22} "[A]lthough arbitration is encouraged as a method to settle disputes, an arbitration clause is not enforceable if it is found to be unconscionable." *Felix v. Ganley Chevrolet, Inc.*, 8th Dist. Cuyahoga Nos. 86990 and 86991, 2006-Ohio-4500, ¶ 15. The Ohio Supreme Court has held that "the proper standard of review of a determination of whether the arbitration agreement is enforceable in light of a claim of unconsionability is de novo, but any factual findings of the trial court must be accorded appropriate deference." *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 2.

{¶ 23} In the case at hand, the trial court found in its journal entry that the CRA was unconscionable, because "substantial terms" of the arbitration clause were not part of the CRA that Klonowski signed. Although the court did not explain what

"substantial terms" it was referring to, we glean from the record, and particularly the motion hearing, that the trial court deemed substantial the fact that the specific arbitration organization, along with its rules and procedures, is not identified in the CRA. Rather, a list of acceptable arbitration organizations is provided, the consumer has the option to choose from the list, and the chosen organization's particular rules are "incorporated by reference" into the CRA.

{¶ 24} Giving deference, as we must, to the trial court's factual finding that the specific rules and procedures of the arbitration forum to be chosen were "never given to plaintiff, shown to plaintiff, or put in front of plaintiff," we find no error here. However, we review whether these facts are unconscionable under a de novo standard.

{¶ 25} Upon review, we find no authority to support the trial court's finding that the CRA in this case is unconscionable. "Unconscionability includes both 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable." (Citations omitted.) *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 34.

{¶ 26} In the case at hand, the court made no finding under the first prong of the *Taylor* test regarding procedural unconscionability. In *Olah v. Ganley Chevrolet, Inc.*, 8th Dist. Cuyahoga No. 86132, 2006-Ohio-694, ¶ 16 (quoting

Johnson v. Mobil Oil Corp., 415 F.Supp. 264, 268 (E.D.Mich. 1976)), this court held the following:

> Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, e.g., age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question.

{¶ 27} Upon review, we find no evidence that Klonowski was under pressure to open an account with Appellants and no evidence that he could not open an account elsewhere. The CRA is legible, clear, unambiguous, and Klonowski signed it. The references to arbitration are in bold print. Klonowski presented no evidence that he was a "weak" party in this transaction. Indeed, Klonowski is an attorney whose education and experience should render him able to read and understand the language in the CRA.

{¶ 28} Turning to the second prong of the *Taylor* test, Ohio courts have held that substantive unconscionability "involves those factors which relate to the contract terms themselves and whether they are commercially reasonable." *Collins v. Click Camera & Video*, 86 Ohio App.3d. 826, 834, 621 N.E.2d 1294 (2d Dist.1993). These factors may include: "the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Id.*

{¶ 29} Klonowski, who bears the burden to show unconscionability, has failed to set forth any evidence or legal authority supporting the argument that the

terms in the CRA are commercially unreasonable. He argues that the CRA "offers absolutely no guidance whatsoever as to even a brief outline of the type of rules that would apply" to an arbitration. He further argues that "it is absolutely irrelevant that hypothetical rules that apply to several fora, one of which no longer even exists, are purported to be incorporated by reference."

{¶ 30} Contrary to Klonowski's argument, the CRA offers some guidance as to the parameters of arbitration and then incorporates by reference the particular rules of the chosen forum. This court has upheld arbitration clauses that are substantially similar to the one at issue. In *Melia v. OfficeMax N. Am., Inc.*, 8th Dist. Cuyahoga No. 87249, 2006-Ohio-4765, the trial court granted a motion to stay pending arbitration, and this court affirmed. The arbitration clause at issue incorporated by reference the arbitration rules of the chosen forum.

> [I]t is commonplace for arbitration agreements to incorporate the [American Arbitration Association] rules. The mere fact that an agreement incorporates the rules does not make it invalid. Rather, the complaining party must be able to specifically cite to, and demonstrate how, a specific provision in the [American Arbitration Association] rules renders the Agreement invalid. * * * We therefore find that Melia's contention that the incorporation of the [American Arbitration Association] rules invalidates the Agreement to be without merit."

Id. at ¶ 36-37. *See also Conte v. Blossom Homes L.L.C.*, 8th Dist. Cuyahoga No. 103751, 2016-Ohio-7480.

{¶ 31} Additionally, this court reversed the trial court's denial of a motion to compel arbitration under circumstances strikingly similar to the facts of the case at hand. In *Estate of Brewer v. Dowell & Jones, Inc.,* 8th Dist. Cuyahoga No. 80563,

2002-Ohio-3440, the plaintiffs opposed arbitration "on the grounds they did not receive or review the 'Customer Agreement' containing the arbitration clause at the time they opened their Fidelity account * * *." This court found that the plaintiffs agreed to arbitration.

> Here, Fidelity had a standard account application and customer agreement which all of its customers received and were required to sign prior to opening a new brokerage account. * * *
>
> The Customer Agreement containing the arbitration provision is specifically identified and incorporated, in bold type-face print, in the New Account Application.
>
> Plaintiffs claim that they did not have knowledge of and failed to receive the incorporated Customer Agreement containing the arbitration clause and thus, did not understand that they were bound to arbitrate all disputes with Fidelity. Plaintiffs also state that they did not read the Fidelity application containing the incorporated clause. These arguments must fail.
>
> First, physical delivery of a contract is not essential to create a legally enforceable agreement. * * * Where the parties intend to be bound by the contract, it is valid, even where a party later claims that he never received a copy of the agreement.
>
> * * *
>
> A party entering a contract has a responsibility to learn the terms of the contract prior to agreeing to its terms. The law does not require that each aspect of a contract be explained orally to a party prior to signing it. * * * 'It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written.'"

(Citations omitted.) *Id.* at ¶ 8-13.

{¶ 32} In the instant case, the court erred as a matter of law by finding that the CRA is both procedurally and substantively unconscionable. Appellants' sole assigned error is sustained. The trial court's denial of Appellants' motion to compel

arbitration and stay proceedings is reversed, and this case is remanded to the trial court for proceedings consistent with this opinion.

It is ordered that appellants recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
RAYMOND C. HEADEN, J., CONCUR

[Cite as *LNV Corp. v. Kempffer*, 2020-Ohio-4527.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

LNV CORPORATION,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2019-G-0232**
- vs -	:	
BARBARA R. KEMPFFER, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 2019 F 000329.

Judgment: Affirmed.

Darryl E. Gormley, Reimer, Arnovitz, Chernek & Jeffrey Co., P.O. Box 39696, 30455 Solon Road, Solon, OH 44139; *Kyle E. Timken, Ann Marie Johnson, Angela D. Kirk, Matthew J. Richardson, Matthew P. Curry, Michael E. Carleton, Melissa N. Hamble* and *Jacqueline M. Wirtz,* Manley Deas Kochalski, LLC, P.O. Box 165028, Columbus, OH 43216 (For Plaintiff-Appellee).

Grace M. Doberdruk, Law Office of Grace M. Doberdruk, 2000 Auburn Drive, One Chagrin Highlands, Suite 200, Beachwood, OH 44122 (For Defendants-Appellants).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Barbara and Timothy Kempffer, appeal the November 8, 2019 Judgment Entry of the Geauga County Court of Common Pleas granting summary judgment for appellee and foreclosing on certain property. For the reasons stated herein, the judgment is affirmed.

{¶2} On August 29, 2007, appellants, husband and wife, signed a promissory note (the "Note") in the amount of $137,000.00 secured by certain property, Parcel No. 10-062010 (the "Property"), as evidenced by a mortgage, signed the same day (the "Mortgage"). The initial lender was National City Mortgage, a division of National City Bank; in 2010, both the Note and Mortgage (collectively, the "Loan") were assigned to appellee, LNV Corporation ("LNV"). The Loan is serviced by MGC Mortgage Corporation, Inc. ("MGC"). On October 5, 2015, after appellants had apparently defaulted, appellants signed a Loan Modification Agreement (the "Modification Agreement") with appellee in which appellants expressly "waived and released any defense * * * to any and all acts, omissions or events occurring prior to the execution of this agreement."

{¶3} In May 2016, appellants again defaulted on the Loan. On May 13, 2016, MGC sent Barbara Kempffer a Notice of Default, giving her until June 22, 2016 to cure. Appellants subsequently made a partial payment in an amount insufficient to cure the default, as MGC notified them in a letter dated June 7, 2016. After appellants failed to cure, MGC sent appellants a Notice of Acceleration on July 7, 2016.

{¶4} Thereafter, however, MGC sent appellants a second Notice of Default dated August 15, 2016 and purported to give appellants until September 24, 2016 to cure. Appellants again sent a partial payment, which MGC returned in a letter dated August 24, 2016, stating "we are returning your funds because we have accelerated your loan and the payment received is insufficient to pay what is owed on the loan or, if applicable, reinstate the loan pursuant to the Notice of Acceleration previously sent to you."

{¶5} LNV filed a complaint in foreclosure action against them on April 12, 2019 and moved for summary judgment on August 15, 2019, which the court ultimately granted. Appellants now appeal, assigning three errors for our review.

{¶6} As each appellee relates to the trial court's award of summary judgment, we shall first set forth the proper standard for our analysis. Appellate courts review summary judgment decisions de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d, 102, 105 (1996). Summary judgment should only be granted "if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C).

{¶7} To support a motion for summary judgment in a foreclosure action, "a plaintiff must present evidentiary-quality materials showing: (1) the movant is the holder of the Note and Mortgage, or is a party entitled to enforce it; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgagor is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due." *Citizens Bank, N.A., v. Duchene,* 11th Dist. Trumbull No. 2018-T-0085, 2019-Ohio-2972, ¶10, citing *JPMorgan Chase Bank, Nat'l Assn. v. Blank,* 11th Dist. Ashtabula No. 2013-A-0060 2014-Ohio-4135, ¶14.

{¶8} The party moving for summary judgment bears the initial responsibility of showing there is no triable issue of fact. *Morris v. Ohio Cas. Ins. Co.*, 35 Ohio St.3d 45, 47 (1988). If the moving party does not meet its initial burden, then no duty arises on the part of the nonmoving party. *Id.* If, however, the moving party meets this burden, the

responsibility shifts to the nonmoving party to show a triable issue of fact. *Id.; Dresher v. Burt,* 75 Ohio St.3d 280 (1996). The nonmoving party must show evidence beyond mere allegations. Civ.R. 56(E); *Morris, supra.* All questions must be resolved in favor of the nonmoving party. *Grafton, supra.*

{¶9} Appellants' first assignment of error states:

{¶10} The trial court erred by granting appellee LNV Corporation's motion for summary judgment when all conditions precedent to foreclosure were not satisfied.

{¶11} Under this assignment of error, appellants argue that appellee failed to send compliant notices of default and acceleration prior to accelerating the Loan and filing this action. Particularly, appellants claim error in that the first Notice of Default, dated May 13, 2016, was not provided in appellee's initial motion for summary judgment, but was only provided in its reply to appellants' opposition and supplemental affidavits. Thus, appellants argued, the court erred in considering this notice in deciding the motion for summary judgment.

{¶12} Ignoring, then, what they purport to be an improperly considered notice of default dated May 13, 2016, appellants argue that the August 15, 2016 notice of default, as was attached to appellee's initial motion for summary judgment, was insufficient to establish that the condition precedent had been met prior to filing this action. Particularly, appellants argue that the August 15, 2016 letter gave them until September 24, 2016 to pay, but appellee returned their August 2016 payment stating "[w]e are returning your funds because we have accelerated your loan and the payment received is insufficient to pay what is owed on the loan…."

{¶13} Further, appellants argue the July 7, 2016 Notice of Acceleration failed to meet the requirements of Paragraph 22 of the Mortgage. They also assert error in that

the July 7, 2016 notice stated they "may" have the right to cure, instead of unequivocally stating they have the right to cure. In support, appellants cite *Fed. Natl. Mtge. Assn. v. Marroquin,* 477 Mass. 82, 89-90 (2017). Finally, appellants argue that the purported notice of acceleration was deficient for having been sent only to Barbara, and not Timothy, though both appellants are considered borrowers.

{¶14} Paragraph 22 of the Mortgage sets forth the requirements for notice prior to acceleration. Particularly, it requires appellee, prior to acceleration, to give appellants notice of:

> **{¶15}** (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure.

{¶16} Appellee asserts that the letters dated May 13, 2016 and August 15, 2016 by MGC meet these requirements. Appellants argue appellee inappropriately attempted to introduce new evidence and argument in its reply to appellants' opposition to the motion for summary judgment. This court, however, has held that an affidavit submitted with a reply brief seeking to clarify a matter previously raised did not constitute a new argument. *Deutsche Bank Natl. Tr. Co. v. Ayers*, 11th Dist. Portage No. 2019-P-0094, 2020-Ohio-1332, ¶48. Here, in appellee's initial motion for summary judgment, they asserted that all conditions precedent, including proper notice, had been met prior to filing the complaint in foreclosure. While appellee did not provide the May 13, 2016 notice of default in the initial motion, they provided the August 15, 2016 notice of default; when appellants filed

their reply and objected, appellee supplemented their motion and included the May 13, 2016 notice of default. This was not a new argument, however, as appellee was not stating for the first time in their reply that they met all conditions precedent, and the trial court did not err in considering it.

{¶17} Furthermore, "when a new argument is raised in a reply, the proper procedure is to strike the reply or, alternatively, to allow the opposing party to file a surreply." *Id.* at ¶49, citing *Hicks v. Cadle Co.,* 11th Dist. Trumbull No. 2014-T-0103, 2016-Ohio-4728, ¶18. Appellants failed to move to strike or for leave for file a surreply, and, thus, any objection to the consideration of such evidence has been waived. *See Ayers, supra,* at ¶50; *Lewis Potts, Ltd. v. Zordich,* 11th Dist. Trumbull No. 2018-T-0028, 2018-Ohio-5341, ¶42.

{¶18} Accordingly, we find no error on the part of the trial court for considering the May 13, 2016 notice of default. Moreover, upon review of the record, we find that the May 13, 2016 and August 15, 2016 notices were not deficient; both notices orderly and specifically provided the information required by Paragraph 22 of the Mortgage.

{¶19} In the remainder of their arguments, appellants ignore the May 13, 2016 notice of acceleration. Appellants contend that the August 15, 2016 notice gave them until September 24, 2016 to cure, but their returned payment notice, dated August 24, 2016, stated the loan had already been accelerated. In this regard, appellants argue that appellee prematurely accelerated the Loan.

{¶20} The May 13, 2016 notice stated appellants had until June 22, 2016 to cure, by paying in full the amount passed due. That notice stated that partial payments *may* be applied or held in suspense but will not be construed as a cure or waiver of appellee's

rights. Appellee provided exhibits to show that appellants did not cure their default by June 22, 2016, but made a partial payment on June 7, 2016, which was unapplied to their balance owed. Appellants failed to cure. Thus, on July 7, 2016, appellee sent appellants a Notice of Acceleration, notifying them the Loan was accelerated as the default had not been cured.

{¶21} Appellee explains the second notice of default stating, "[t]he only reasons that MGC sent these letters on two separate occasions were that the borrowers' partial payment of $1500 on June 16, 2016 was sufficient to advance the due date for their mortgage loan one month, from April 2016 to May 2016 and further MGC evidently acted out of an abundance of caution." It notes that neither the Mortgage nor Ohio law required multiple notices of default if the borrower fails to cure after the first notice; accordingly, it argues, it had the right to accelerate on June 22, 2016, and properly did so as evidenced in its July 7, 2016 notice.

{¶22} We agree; while the second notice of default may have stated appellants had until September 24, 2016 to cure, appellants had already been notified that the Loan had been accelerated. Moreover, appellants did not at any point before or after September 24, 2016 cure the default but only provided a partial payment that, according to the terms of the Mortgage, appellee had the right to return. Appellee was within its right to accelerate the Loan as it did in July 2016 and gave appellants multiple opportunities to cure before filing the action in foreclosure in April 2019.

{¶23} Appellants also argue the July 7, 2016 Notice of Acceleration did not meet the requirements of Paragraph 22 of the Mortgage. This argument is without merit; the July 7, 2016 notice did not have to meet the requirements of Paragraph 22 as those

requirements govern the required notices of default prior to acceleration, which appellee complied with in its May 13, 2016 notice of default.

{¶24} Appellants also argue the July 7, 2016 notice of acceleration was flawed because it stated that appellants "may" have the right to reinstate after acceleration, instead of unequivocally stating that right, citing *Marroquin*. In *Marroquin,* the Supreme Judicial Court of Massachusetts held that use of the word "may," as opposed to unequivocal language, failed to strictly comply with the terms of the mortgage, thus rendering the notice insufficient. This court has recently rejected this argument, stating:

> **{¶25}** In addition to being nonbinding, we find *Marroquin* to be inapposite. Unlike in Ohio, Massachusetts permits foreclosure of mortgages by the exercise of a "power of sale" without "judicial oversight." *See id.* at 86, 74 N.E.3d 592. Because of that "substantial power," the lender must "strictly comply with the terms of a mortgage." *See id.* Apparently, the case on which *Marroquin* relies was decided by a bare majority and has not been followed outside of Massachusetts other than in Alabama. *See Aubee v. Selene Fin., LP*, D.R.I. No. 19-37WES, 2019 WL 7282019, *5 (Dec. 27, 2019). *Ayers, supra,* at ¶87.

{¶26} Finally, appellants' argument that Timothy Kempffer did not receive notice prior to acceleration is without merit. Paragraph 15 of the Mortgage states that "[n]otice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise." As appellants do not dispute that Barbara Kempffer received the May 13, 2016 and August 15, 2016 notices, any argument that appellee failed to meet a condition precedent in regard to notice to Timothy is without merit.

{¶27} Accordingly, appellants' first assignment of error is without merit.

{¶28} The second assignment of error states:

> **{¶29}** The trial court erred by granting summary judgment when material issues of fact remained for trial[.]

{¶30} Under this assignment of error, appellants challenge the validity of the chain of mortgage assignments. However, the record shows that appellants signed a Loan Modification Agreement in which they expressly "waived and released any defense * * * to any and all acts, omissions or events occurring prior to the execution of this agreement" and which expressly named appellee as the lender. Appellee also notes that a few weeks before the case at bar the same trial court ruled that appellee was current holder of the borrowers' note and mortgage and attached a copy of that judgment entry to its motion for summary judgment. Appellants challenge this argument by arguing they were not made parties to that action.

{¶31} Preliminarily, we note that appellants were not necessary parties to the prior action. As this court has previously held, borrowers do not have standing to challenge mortgage assignments unless they are affected by the assignment. *U.S. Bank Nat'l Assn. v. Blank,* 11th Dist. Ashtabula No. 2014-A-0036, 2015-Ohio-1687, ¶12. Here, appellants do not argue that they were in any way affected by the assignment, nor is there any evidence to support such a claim.

{¶32} The trial court found that there was a mutual mistake in the execution and recording of the intervening assignment of mortgage to U.S. Bank; that this intervening assignment was never the intention of the parties; that recording is void; and that appellee was the current holder.

{¶33} Appellants expressly waived any and all defenses from actions or omissions occurring prior to the signing of the Loan Modification Agreement. The purported discrepancies that appellants point to occurred prior to the signing of the Loan Modification Agreement. Furthermore, the trial court had previously adjudicated the

matter of whether appellee was the owner of this particular loan and found that it was. For the trial court to find otherwise in this case would be to directly contradict its own prior holding. Accordingly, we cannot agree there was a question of material fact as to whether appellee was the owner of the Loan and entitled to bring this action.

{¶34} Accordingly, appellants' second assignment of error is without merit.

{¶35} Appellants' third assignment of error states:

> **{¶36}** The trial court erred by granting appellee's motion for summary judgment because the affidavit of Victoria Wolff was not made on personal knowledge[.]

{¶37} Appellants argue that Victoria Wolff's affidavit was insufficient because she was relying on records from other services and she did not state that she had personal knowledge of the record-keeping systems of any servicer other than MGC Mortgage Corporation, Inc. In support, appellants cite *Bank of New York Mellon v. Roulston*, 8th Dist. Cuyahoga No. 104908, 2017-Ohio-8400. Appellants assert particular error in that without personal knowledge, the affiant could not authenticate when appellee obtained possession of the original note, where the note was stored, or whether the note had been transferred. These arguments, however, attempt to question whether appellee was a party entitled to enforce this Loan, a matter which, as discussed under the second assignment of error, appellants waived in the Loan Modification Agreement.

{¶38} They also argue that the affiant claimed appellee had possession of the original note on August 21, 2009, but the mortgage was not assigned to appellee until January 6, 2010; the affiant based her knowledge on a letter from Dovenmuehe Mortgage, Inc. ("DMI") in April 2017 that the note will be sent to appellants' attorneys; and that there were no properly authenticated records attached to the affidavit to establish custody of the original note.

{¶39} Pursuant to Civ.R. 56(E), in a motion for summary judgment "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." *Id.* "'[The] mere assertion of personal knowledge satisfies the personal knowledge requirement of Civ.R. 56(E) if the nature of the facts in the affidavit combined with the identity of the affiant create a reasonable inference that the affiant has personal knowledge of the facts in the affidavit.'" *Ayers, supra,* at ¶53, quoting *Merlo,* at ¶25.

{¶40} "[T]he witness must be sufficiently familiar with the operation of the business and with the circumstances of the record's preparation and maintenance that he or she can reasonably testify, on the basis of this knowledge, that the record is what it purports to be and that it was made in the ordinary course of business." *Ayers, supra,* at ¶54. However, there is no requirement that the affiant have firsthand knowledge of the transaction giving rise to the record. *Id.*

{¶41} This court recently addressed the application of *Roulston* to similar circumstances in *Ayers.* There, this court noted that this court has not adopted the *Roulston* holding and that the Eighth District subsequently narrowed its *Roulston* holding. Instead, this court has consistently held that "an employee of a loan servicer had the requisite personal knowledge about the material for which he averred by stating his personal knowledge was based on his position and that he personally reviewed the loan servicer's regularly kept business records." *See Ayers,* at ¶57; *Portage Cty. Commrs. v. O'Neil,* 11th Dist. Portage No. 2013-P-0066, 2015-Ohio-808, ¶17-18; *U.S. Bank Natl. Assn. v. Martz*, 11th Dist. Portage No. 2013-P-0028, 2013-Ohio-4555, ¶25.

{¶42} Furthermore, in both the original and supplemental affidavits, Ms. Wolff expressly attested to having "personal knowledge of and [being] familiar with the record keeping system of LNV Corporation and MGC." While the answers to interrogatories had previously shown that DMI was MGC's subservicer, in her supplemental affidavit, Ms. Wolff clarified that she also has personal knowledge of how records are kept and maintained by MGC's subservicer, DMI. She also stated she had access to and reviewed appellants' Loan records, which she attested were made "at or near the time of the event and by or from information transmitted from a person with knowledge." Additionally, she testified that she "personally reviewed and independently verified the accuracy of the factual information included in this affidavit through my review of the aforementioned business records." She attested that true and accurate copies were attached to her affidavit, that appellants were in default, and the amount of default.

{¶43} Thus, appellee presented sufficient evidence to create a reasonable inference that Ms. Wolff's affidavit was based on personal knowledge and the burden shifted to appellants to present evidence demonstrating the affidavit was not based on personal knowledge. Appellants did not meet this burden but merely stated in a conclusory fashion that Ms. Wolff did not have personal knowledge and that the affidavits contradicted one another.

{¶44} No contradiction is apparent from the record. Ms. Wolff expressly stated her affidavit was based on personal knowledge. She attached copies of the business records to which she refers to her affidavits, and attested the records were "true and accurate copies" of the originals. Accordingly, appellants' third assignment of error is without merit.

{¶45} In light of the foregoing, the judgment of the Geauga County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J., concurs,

THOMAS R. WRIGHT, J., concurs in judgment only.

[Cite as *Clinton v. Home Invest. Fund*, 2020-Ohio-4555.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

PATRICK D. CLINTON,	:	APPEAL NO. C-190646 TRIAL NO. A-1801700
and	:	
ALICIA K. CLINTON,	:	*O P I N I O N.*
Plaintiffs-Appellees,	:	
vs.	:	
HOME INVESTMENT FUND V, LP, Successor in Interest to Mortgage Electronic Registration Systems, Inc., as Nominee for The Huntington National Bank,	:	
Defendant/Third-Party Plaintiff-Appellant,	:	
and	:	
UNION SAVINGS BANK,	:	
Third-Party Defendant-Appellee,	:	
and	:	
JIHAD KASSEM,	:	
Third-Party Defendant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Appeal Dismissed

Date of Judgment Entry on Appeal: September 23, 2020

Sikora Law LLC, Richard T. Craven, George H. Carr and *Michael R. Neiman,* for Plaintiffs-Appellees Patrick D. Clinton and Alicia K. Clinton,

Wood & Lamping LLP and *C.J. Schmidt*, for Defendant/Third-Party Plaintiff-Appellant Home Investment Fund V, LP,

Strauss Troy Co., LPA, C. Richard Colvin and *Alex S. Rodger*, for Third-Party Defendant-Appellee Union Savings Bank.

CROUSE, Judge.

{¶1} Currently pending before this court is defendant/third-party plaintiff-appellant Home Investment Fund V, LP's, ("HIFV") appeal from the trial court's grant of summary judgment in favor of plaintiffs-appellees Patrick and Alicia Clinton. This appeal centers around real property located at 4417 Floral Avenue, Norwood, Ohio. During the pendency of this appeal, the Clintons sold the property to Ashley Chase and Scott Harvey (the "Purchasers"), who are not parties to this appeal. The Clintons and third-party defendant-appellee Union Savings Bank moved this court to dismiss the appeal as moot since neither the Clintons nor Union Savings Bank continue to have any interest in the subject property. HIFV agrees that the Clintons and Union Savings Bank should be dismissed, but they argue that this appeal is not moot based on the doctrine of lis pendens. Having considered the arguments of the parties, we find that this appeal must be dismissed as moot for the reasons set forth below.

I.

{¶1} On January 24, 2008, Jihad Kassem executed and delivered to The Huntington National Bank a promissory note in the amount of $190,000. As security for payment on the note, Kassem executed a mortgage on real property located at 4417 Floral Avenue, Norwood, Ohio. The mortgage designated Huntington Bank as the lender and Mortgage Electronic Registration Systems, Inc., ("MERS") (solely as nominee for the lender) as the mortgagee. Kassem eventually defaulted on the note.

{¶2} Kassem also defaulted on his property-tax obligations. In December 2015, Adair Asset Management, LLC, ("Adair") which had acquired the property-tax certificates, filed a foreclosure action against Kassem. Adair sought a sale of the subject property and payment in the first-priority-lien position. The complaint

named as defendants Jihad Kassem, the unknown spouse of Jihad Kassem, the Hamilton County treasurer, and Huntington Bank. MERS was not named as a defendant in the action. Although named as a defendant, Huntington Bank did not respond to the complaint.

{¶3} On March 24, 2016, the trial court entered judgment in favor of Adair and adjudicated Huntington Bank as being in default. The court entered a decree of foreclosure and confirmed a sheriff's sale of the property. On September 6, 2016, the court ordered a distribution of the sale proceeds and extinguished Huntington Bank's mortgage on the property.

{¶4} On January 2, 2018, MERS assigned its interest in Huntington Bank's mortgage to HIFV. On March 29, 2018, Carole Kassem, the purchaser of the subject property, initiated a quiet-title action against MERS. After the complaint was filed, Carole sold the property to Patrick and Alicia Clinton. The Clintons executed a promissory note and mortgage in favor of Union Savings Bank to purchase the property. The Clintons promptly substituted as plaintiffs in the quiet-title action.

{¶5} On July 5, 2018, HIFV, as the successor in interest to MERS, filed an answer in the quiet-title action. HIFV also asserted a counterclaim against the Clintons and filed a third-party complaint against Union Savings Bank for foreclosure. HIFV argued that because MERS was not named as a defendant in the tax-foreclosure case, the Huntington Bank mortgage remained a valid lien on the subject property despite the trial court's order.

{¶6} The parties filed cross-motions for summary judgment on September 11 and 12, 2019. Following extensive briefing from the parties and the submission of numerous exhibits, the trial court determined that MERS was not a necessary party

to the tax-foreclosure case. On November 1, 2019, the court entered judgment quieting title in favor of the Clintons and Union Savings Bank.

{¶7} On November 7, 2019, HIFV filed a notice of appeal. HIFV did not file for a stay of execution and did not post a supersedeas bond. During the pendency of this appeal, the Clintons sold the subject property to the Purchasers. As a result of the sale, the Clintons satisfied their obligations to Union Savings Bank, and Union Savings Bank released its mortgage on the property. The Clintons and Union Savings Bank subsequently moved to dismiss the appeal as moot. HIFV opposed the motion and filed a cross-motion to dismiss, arguing that the Clintons and Union Savings Bank should be dismissed as parties but the appeal should not be dismissed due to the doctrine of lis pendens.

II.

{¶1} Lis pendens is a common-law legal doctrine that literally means "a pending lawsuit." *Cincinnati ex rel. Ritter v. Cincinnati Reds, L.L.C.*, 150 Ohio App.3d 728, 2002-Ohio-7078, 782 N.E.2d 1225, ¶ 30 (1st Dist.). "It means that the filing of a lawsuit concerning specific property gives notice to others of the claim alleged in the lawsuit and that a purchaser of the property may take the property subject to the outcome of the lawsuit." *Id.*

{¶2} R.C. 2703.26 codifies the doctrine of lis pendens. R.C. 2703.26 provides: "When a complaint is filed, the action is pending so as to charge a third person with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title."

{¶3} Lis pendens is a procedural device designed to protect the status quo of the litigants' interest in the subject property while an action is pending. *A.P.W.O., Inc. v. Toebben, Ltd.*, 1st Dist. Hamilton No. C-920147, 1993 WL 323395, *1 (Aug. 25, 1993);

Katz v. Banning, 84 Ohio App.3d 543, 617 N.E.2d 729 (10th Dist.1992); *Irwin Mtge. Corp. v. DuPee*, 197 Ohio App.3d 117, 2012-Ohio-1594, 966 N.E.2d 315, ¶ 9 (12th Dist.). "If applicable, it does not prevent persons from transacting an interest in the property subject to litigation. Any conveyed interest, however, becomes subject to the outcome of the pending litigation." *Cincinnati ex rel. Ritter* at ¶ 31.

{¶4} Lis pendens operates only while the action is pending. R.C. 2703.26 provides that an action begins pending "[w]hen a complaint is filed." However, R.C. 2703.26 does not provide for a terminating event. The Clintons and Union Savings Bank contend that lis pendens terminated when the trial court entered summary judgment in their favor. They claim that lis pendens does not continue on appeal unless and until the losing party obtains a stay and posts a supersedeas bond. On the other hand, HIFV contends that lis pendens automatically continues on appeal and does not terminate until all of the legal proceedings concerning the subject property have concluded. It argues that it is unnecessary to file a stay.

{¶5} The Clintons and Union Savings Bank argue that we should follow our precedent in *A.P.W.O., Inc. v. Toebben, Ltd.*, and dismiss the case as moot.

{¶6} In *A.P.W.O., Inc.*, the plaintiff property owners filed an action against tenant A.P.W.O. seeking a declaration that a lease involving the subject property was void. The trial court ruled in favor of the plaintiffs, finding the lease void. A.P.W.O. appealed the judgment, but did not obtain a stay of execution or post a supersedeas bond. During the pendency of the appeal, the plaintiffs sold the subject property to Toebben. A.P.W.O. subsequently brought a damages action against Toebben for breach of lease. The trial court granted summary judgment in favor of Toebben, finding that the effectiveness of the declaratory judgment was not properly stayed pending appeal.

{¶7} On appeal of the damages action, this court effectively held that lis pendens terminates upon a final judgment in the trial court. This court reasoned that lis pendens is a procedural doctrine, and therefore, is superseded by App.R. 7 and Civ.R. 62. *A.P.W.O., Inc.*, 1st Dist. Hamilton No. C-920147, 1993 WL 323395, at *1. Accordingly, a party must seek a stay of judgment pending appeal in order to reinvoke lis pendens and protect its interest in the underlying property.

{¶8} HIFV argues that we should decline to follow the decision in *A.P.W.O., Inc.*, because it concerned a lease dispute, and unlike HIFV's mortgage, the lease was not recorded in the Hamilton County records. Thus, HIFV argues that *A.P.W.O., Inc.*, does not address the issue of eliminating a recorded interest in real estate, and is inapplicable. HIFV contends that we should instead follow the Fifth District case of *Sayer v. Epler*, 5th Dist. Licking Nos. 00CA76 and 00CA85, 2001 WL 815507 (Jul. 9, 2001).

{¶9} In *Sayer*, the plaintiff-administrator filed an action seeking a declaration that the subject property was included in the probate estate. The trial court dismissed the action and the defendant sold the property. The plaintiff subsequently filed a notice of appeal. On appeal, the Fifth District reversed and remanded the case to the trial court. The trial court again dismissed the action on the grounds that the purchasers of the property obtained their interest in the property without notice of the lawsuit, and therefore, were bona fide purchasers. The trial court concluded that the doctrine of lis pendens could not be invoked to provide constructive notice because the plaintiff failed to obtain a stay or post a bond prior to filing the appeal.

{¶10} The Fifth District reversed, holding that the doctrine of lis pendens applied to prevent the purchasers from claiming bona-fide-purchaser status. The Fifth District found that the purchasers had been served with the summons and complaint prior to the sale, and that the appeal was pending at the time of closing. Therefore, the

Fifth District concluded that the purchasers knew claims were pending against the property and that the plaintiff's failure to obtain a stay did not give the purchasers the right to rely upon the trial court's judgment.

{¶11} The dissent concluded that the doctrine of lis pendens did not apply. The dissent agreed with the purchasers' reliance on *A.P.W.O., Inc.* However, instead of relying on the interplay of R.C. 2703.26 and App.R. 7, the dissent ultimately relied on the finality of the trial court's judgment. The dissent found that the original action had been finally determined by the trial court and that the trial court's judgment was effective upon its filing. Therefore, the dissent concluded that the judgment was fully enforceable absent a stay of execution and the purchasers had a right to rely upon the finality of the judgment.

{¶12} We find *A.P.W.O., Inc.*, to be applicable to this case. As discussed above, Ohio courts have universally held that lis pendens is a procedural doctrine, and thus, R.C. 2703.26 is a procedural statute. *A.P.W.O., Inc.*, made clear that "[a]s a procedural statute, it has been superseded by App.R. 7 and Civ.R. 62." *A.P.W.O., Inc.* at *1, citing Article IV, Section 5(B), Ohio Constitution. Therefore, the trial court's November 1, 2019 judgment in this case was effective upon its filing and fully enforceable until stayed or reversed on appeal. HIFV never obtained a stay of execution or posted a supersedeas bond in order to reinvoke lis pendens. Accordingly, when the subject property was sold to purchasers who are not parties to this appeal, the appeal became moot and must be dismissed.

Appeal dismissed.

ZAYAS, P.J., and **MYERS, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

[Cite as *Barlow v. Gap, Inc.*, 2020-Ohio-4382.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MEGHAN LEWIS BARLOW, :

Plaintiff-Appellant, :

No. 109101

v. :

THE GAP, INC., :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 10, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-912111

Appearances:

Jeremy Gilman, Attorney, L.L.C., and Jeremy Gilman; Harvey Abens Iosue Co., L.P.A., Matthew B. Abens, and David L. Harvey, III, *for appellant*.

Tucker Ellis L.L.P., Tariq M. Naeem, Chelsea R. Mikula, and Chelsea M. Croy Smith; Morgan, Lewis & Bockius L.L.P., and Wendy West Feinstein, *for appellee*.

MARY J. BOYLE, P.J.:

{¶ 1} Plaintiff-appellant, Meghan Lewis Barlow, appeals the trial court's judgment granting defendant-appellee, The Gap, Inc.'s ("The Gap"), motion for summary judgment. Barlow raises one assignment of error for our review:

> The trial court erred by granting [The Gap's] Motion to Dismiss the Complaint as a Matter of Law, Converted to a Motion for Summary Judgment.

{¶ 2} Finding no merit to her assignment of error, we affirm the trial court's judgment.

I. Factual Background and Procedural History

{¶ 3} In March 2019, Barlow filed a complaint against The Gap, alleging that it violated Ohio's Consumer Sales Practices Act, R.C. Chapter 1345 ("CSPA"). Barlow sought a declaratory judgment that The Gap violated the CSPA, and she requested injunctive relief to stop The Gap from continuing to violate the CSPA. She also sought attorney fees incurred in bringing the lawsuit.

{¶ 4} Barlow alleged that The Gap owns and operates retail stores in Cuyahoga County, Ohio, where it sells apparel and goods to consumers. Barlow alleged that in 2017 and 2018, she "purchased goods primarily for personal, family, or household use from a store owned and operated by The Gap located in Cuyahoga County, Ohio." She claimed that The Gap displayed signs near its store entrances and windows that advertised promotions to encourage the public to enter its stores and buy its goods. She attached images of three such signs to her complaint. The signs contained the following text:

> Sale, take an extra 40% off Markdowns[.] Gap[.] Certain restrictions apply. See a store associate for details. Discount taken at register.
>
> 40% off your purchase[.] Excludes markdowns. Certain restrictions apply. See store associate for details.
>
> Buy one, get one 50% off entire store[.] Gap[.] Certain restrictions apply. See a store associate for details.

On each sign, the text announcing the promotion was in large print, while the text indicating the exclusions and restrictions was in smaller print near the bottom of the signs.

{¶ 5} Barlow alleged that the signs were deceptive acts or practices in connection with consumer transactions in violation of R.C. 1345.02(A). She alleged that the signs do not clearly and conspicuously state, near the words announcing The Gap's promotions, any material exclusions, reservations, limitations, modifications, or conditions to those promotions.

{¶ 6} In May 2019, The Gap filed a motion to dismiss Barlow's complaint for failing to state a claim upon which relief could be granted pursuant to Civ.R. 12(B)(6). The Gap argued that Barlow failed to allege a deceptive act. The Gap maintained that the signs were not offers within the meaning of the CSPA, not false, and not material to a purchasing decision because the signs did not identify specific products or prices. The Gap supported its motion to dismiss with a declaration of Matthew Waterbury, senior manager of marketing at The Gap. Waterbury declared the dimensions of the signs included in Barlow's complaint and the dates those signs were displayed. The declaration attached copies of the signs as exhibits and stated that the images were true and correct copies of the images from the complaint.

{¶ 7} Barlow filed a motion to convert The Gap's motion to dismiss to a motion for summary judgment, arguing that The Gap's motion to dismiss referred

to matters outside of the complaint, including an unknown "reasonable customer" and Waterbury's declaration. The trial court denied the motion.

{¶ 8} Barlow then filed an opposition to The Gap's motion to dismiss, arguing that her complaint set forth allegations as to each element to demonstrate that The Gap's signs are deceptive under Ohio Adm.Code 109:4-3-02(A)(1). The Gap filed a reply in support of its motion to dismiss. Barlow moved to strike The Gap's reply as filed without leave of court in violation of Loc.R. 11.0(D) of the Court of Common Pleas of Cuyahoga County, General Division. The Gap moved for leave to file its reply. The trial court granted The Gap's motion for leave and denied Barlow's motion to strike the reply brief.

{¶ 9} In June 2019, during a case management conference, the trial court converted The Gap's motion to dismiss to a motion for summary judgment (hereinafter referred to as "The Gap's motion for summary judgment"). The trial court permitted the parties to engage in further discovery limited to the topics in The Gap's motion for summary judgment and to supplement their motions. The Gap did not supplement its motion.

{¶ 10} In September 2019, Barlow filed a new opposition to The Gap's motion for summary judgment, arguing that The Gap failed to support its motion with any evidence. Barlow simultaneously moved to strike Waterbury's declaration because it was not an affidavit. The Gap filed a reply in support of its motion for summary judgment, arguing that the only relevant facts to its motion were the undisputed language of its signs. In support of its reply, The Gap filed an affidavit

of Matthew Waterbury, which was substantively identical to his declaration. Barlow moved to strike the Waterbury affidavit as untimely, which The Gap opposed.

{¶ 11} On October 7, 2019, the trial court allowed The Gap to replace the Waterbury declaration with the Waterbury affidavit and granted The Gap's motion for summary judgment. It is from this judgment that Barlow now appeals.

II. Law and Analysis

{¶ 12} In her single assignment of error, Barlow argues that the trial court erred by granting The Gap's motion for summary judgment. She contends that the trial court's judgment should be reversed because (1) The Gap failed to produce any evidence in support of its motion for summary judgment, (2) the CSPA is a strict-liability statute, and she does not need to show that the signs were false or material to customers' purchasing decisions, and (3) The Gap's signs are "offers" within the meaning of Ohio Adm.Code 109:4-3-01(C)(3) and violate the disclosure requirements of Ohio Adm.Code 109:4-3-02(A)(1). The Gap argues that the pleadings and Waterbury's affidavit satisfied its burden on summary judgment and counters each of Barlow's arguments.

{¶ 13} We review a trial court's judgment granting a motion for summary judgment de novo. *Citizens Bank, N.A. v. Richer*, 8th Dist. Cuyahoga No. 107744, 2019-Ohio-2740, ¶ 28. Thus, we independently "examine the evidence to determine if as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997). We therefore review the trial court's order without giving any deference to the trial court. *Citizens*

Bank at ¶ 28. "On appeal, just as the trial court must do, we must consider all facts and inferences drawn in a light most favorable to the nonmoving party." *Glemaud v. MetroHealth Sys.*, 8th Dist. Cuyahoga No. 106148, 2018-Ohio-4024, ¶ 50.

{¶ 14} Pursuant to Civ.R. 56(C), summary judgment is proper where (1) "there is no genuine issue as to any material fact," (2) "the moving party is entitled to judgment as a matter of law," and (3) "reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made." *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). Trial courts should award summary judgment only after resolving all doubts in favor of the nonmoving party and finding that "reasonable minds can reach only an adverse conclusion" against the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138 (1992).

{¶ 15} Under the CSPA, "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction." R.C. 1345.02(A). "Any consumer may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter." R.C. 1345.09(D).

{¶ 16} The Ohio Attorney General adopted regulations, Ohio Adm.Code 109:4-3, to define what conduct violates the CSPA. The purposes and policies of these regulations are to (a) "[d]efine with reasonable specificity the acts and

practices" that violate the CSPA, (b) "[p]rotect consumers from suppliers who engage in referral selling, commit deceptive acts or practices, or commit unconscionable acts or practices," and (c) "[e]ncourage the development of fair consumer sales practices." Ohio Adm.Code 109:4-3-01(A)(2). The regulations "shall be liberally construed and applied to promote their purposes and policies." Ohio Adm.Code 109:4-3-01(A)(1).

{¶ 17} The regulation at issue in this appeal is Ohio Adm.Code 109:4-3-02(A)(1), which states:

> It is a deceptive act or practice in connection with a consumer transaction for a supplier, in the sale or offering for sale of goods or services, to make any offer in written or printed advertising or promotional literature without stating clearly and conspicuously in close proximity to the words stating the offer any material exclusions, reservations, limitations, modifications, or conditions. Disclosure shall be easily legible to anyone reading the advertising or promotional literature and shall be sufficiently specific so as to leave no reasonable probability that the terms of the offer might be misunderstood.

{¶ 18} "Supplier" means "a seller * * * or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer." R.C. 1345.01(C). The parties do not dispute that The Gap is a supplier. "Consumer transaction" means "a sale * * * or other transfer of an item of goods * * * to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things." R.C. 1345.01(A). The parties do not dispute that The Gap displays its signs at issue here "in connection with a consumer transaction."

A. The Gap's Support for Its Motion for Summary Judgment

{¶ 19} Barlow contends that The Gap failed to carry its evidentiary burden on summary judgment. We disagree.

{¶ 20} The moving party has the burden to show that no genuine issue of material fact exists. *Citizens Bank*, 8th Dist. Cuyahoga No. 107744, 2019-Ohio-2740, at ¶ 30. Civ.R. 56(C) provides the list of materials that parties may use to support a motion for summary judgment:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.

{¶ 21} Here, The Gap supported its motion for summary judgment with the pleadings and Waterbury's affidavit. Paragraphs 15 through 20 of the complaint include images and descriptions of The Gap's signs underlying this appeal. At no point has The Gap denied the allegations setting forth the images and language of the signs. Barlow challenged Waterbury's affidavit on procedural grounds, but Waterbury merely restates the complaint's allegations about the descriptions of the signs and attaches as exhibits clearer images of the signs included in the complaint. There is no genuine dispute about the language and text placement on the signs, and The Gap relied on no additional facts in support of its motion for summary judgment. We therefore reject Barlow's arguments that The Gap failed to meet its evidentiary burden.

B. Falsity and Materiality

{¶ 22} The Gap argues that, regardless of whether The Gap's signs are "offers" and properly disclose restrictions, it is not liable under the CSPA because Barlow has not claimed that The Gap's signs are false and material to customers' purchasing decisions. The Gap contends that R.C. 1345.02 is not a strict-liability statute, but rather CSPA violations are considered through a lens of reasonableness. Barlow argues that R.C. 1345.02 is a strict-liability statute and maintains that falsity and materiality are "immaterial" because the text of Ohio Adm.Code 109:4-3-02(A)(1) does not require offers to be false or material to purchasing choices.

{¶ 23} Ohio courts have not interpreted the CSPA to be a strict-liability statute and instead have considered "reasonableness" when determining whether conduct violates the CSPA. *See Grgat v. Giant Eagle, Inc.*, 2019-Ohio-4582, 135 N.E.3d 846, ¶ 17 (8th Dist.) ("[T]here is nothing in the plain language of R.C. 1345.02(B) that indicates a purpose to impose strict liability. And courts have declined to interpret the statute in a manner that would impose strict liability."); *Struna v. Convenient Food Mart*, 160 Ohio App.3d 655, 2005-Ohio-1861, 828 N.E.2d 647, ¶ 15 (8th Dist.) ("[C]ourts shall apply a reasonableness standard in determining whether an act amounts to deceptive, unconscionable, or unfair conduct."); *Shumaker v. Hamilton Chevrolet, Inc.*, 184 Ohio App.3d 326, 2009-Ohio-5263, 920 N.E.2d 1023, ¶ 19-22 (4th Dist.) (applying a reasonableness standard); *Conley v. Lindsay Acura*, 123 Ohio App.3d 570, 575, 704 N.E.2d 1246 (10th Dist.1997) ("[W]e decline to hold that reasonableness plays no part

whatsoever in the determination as to whether an act amounts to deceptive, unconscionable, or unfair conduct."). Barlow cites no cases to the contrary to support her position that R.C. 1345.02 is a strict-liability statute.

{¶ 24} Instead of imposing strict liability, Ohio courts "have held that whether a supplier's act or omission is a violation of the CSPA depends on how a reasonable consumer would view it." *Grgat* at ¶ 18. Conduct violates the CSPA if it "'has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts.'" *Chesnut v. Progressive Cas. Ins. Co.*, 166 Ohio App.3d 299, 2006-Ohio-2080, 850 N.E.2d 751, ¶ 23 (8th Dist.), quoting *McCullough v. Spitzer Motor Ctr., Inc.*, 8th Dist. Cuyahoga No. 64465, 1994 Ohio App. LEXIS 262, 23 (Jan. 27, 1994).

{¶ 25} Moreover, this court has previously held that for conduct to be "deceptive under the CSPA," the conduct "must be both false and material to the consumer transaction." *Grgat* at ¶ 16. In *Grgat*, the plaintiff alleged that Giant Eagle violated the CSPA with signs that promoted a discounted price for a specific number of units for a particular product, such as ten cans for $10, without specifying that the price of a single can was also discounted. *Id.* at ¶ 3. The plaintiff argued that he did not need to prove that the signs were false or material to his purchasing decisions because R.C. 1345.02 is a strict-liability statute and nothing in the text required him to prove falsity or materiality. *Id.* at ¶ 11-16. This court disagreed. *Id.* at ¶ 16-18.

{¶ 26} We explained that "[a]lthough R.C. 1345.02 does not use the word 'falsity' or 'false,' each and every deceptive practice listed in the R.C. 1345.02 describes a misrepresentation of the truth, i.e., a falsity. * * * [F]alsity is the essence of deception." *Grgat*, 2019-Ohio-4582, 135 N.E.3d 846, at ¶ 15. Likewise, for the materiality requirement, we explained:

> Although the R.C. 1345.02 does not explicitly state that misrepresentations must be material to the transaction, it is well established that a deceptive act or practice under the CSPA is one that "'has the tendency or capacity to mislead consumers concerning a fact or circumstance *material* to a decision to purchase the product or service offered for sale.'" (Emphasis added.) *Richards v. Beechmont Volvo*, 127 Ohio App.3d 188, 711 N.E.2d 1088 (1st Dist.1998), quoting *Cranford v. Joseph Airport Toyota, Inc.*, 2d Dist. Montgomery No. 15408, 1996 Ohio App. LEXIS 2252 (May 17, 1996). *See also Davis v. Byers Volvo*, 4th Dist. Pike No. 11CA817, 2012-Ohio-882, ¶ 29.

Id. at ¶ 16.

{¶ 27} Therefore, regardless of whether The Gap's signs are considered "offers" under the CSPA and whether the signs failed to disclose restrictions pursuant to Ohio Adm.Code 109:4-3-02(A)(1), The Gap would not be liable under the CSPA unless Barlow proved that the signs were false, material to consumers' purchasing decisions, and likely to mislead a reasonable consumer. Barlow, however, has not alleged, argued, or presented evidence that The Gap's signs were false, material, or misleading. Barlow's arguments that The Gap's signs are offers and that the signs failed to disclose restrictions are therefore moot, and we need not address them.

{¶ 28} Even drawing all facts and inferences in favor of Barlow, we find that there is no genuine issue as to any material fact, The Gap is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion in favor of The Gap. We therefore overrule Barlow's assignment of error and affirm the judgment of the trial court.

It is ordered that appellee and appellant split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
MICHELLE J. SHEEHAN, J., CONCUR